

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

* * *

ROY D. MORAGA,

Plaintiff,

v.

MINEV, *et al.*,

Defendants.

Case No. 3:21-cv-00482-MMD-CSD

ORDER

I. SUMMARY

Plaintiff Roy D. Moraga, who is an inmate in the custody of the Nevada Department of Corrections (“NDOC”), brings this action under 42 U.S.C. § 1983 against Defendants Michael Minev, Jessica Rambur,¹ and Danielle Richard. (ECF No. 6.) Before the Court is a Report and Recommendation of United States Magistrate Judge Craig S. Denney (ECF No. 50 (“First R&R”)) recommending the Court deny Plaintiff’s motion for judgment on the pleadings (ECF No. 25 (“Plaintiff’s Motion”)), as well as a Report and Recommendation (ECF No. 52 (“Second R&R”)) recommending the Court grant Defendants’ motion for summary judgment (ECF No. 31 (“Defendants’ Motion”)). Plaintiff filed an objection, which the Court construes as objecting to both R&Rs. (ECF No. 53 (“Objection”).)² Because the

¹Defendants note that Rambur was identified as “J. Isaacson” in the operative complaint. The Court will use Rambur as the purportedly correct name in this order. (ECF No. 14 at 1 (notice of acceptance of service); ECF No. 54 at 1.)

²While the Objection is not clearly labelled as to the First R&R or Second R&R, the Court liberally construes it as an objection to both R&Rs, as Plaintiff references the standard for judgment on the pleadings (ECF No. 53 at 1-2) and specifically responds to findings made in the Second R&R (*id.* at 3-4).

Defendants responded to the Objection. (ECF No. 54.) Plaintiff filed a reply to Defendants’ response. (ECF No. 55.) The Court does not consider the reply because, under Local Rule IB 3-1(a), “[r]eplies [to responses to objections] will be allowed only with leave of the court,” and Plaintiff did not seek leave of court. In any event, considering the reply would not change the Court’s analysis here.

1 Court agrees with Judge Denney's analysis as to both Motions, the Court will adopt the
2 R&Rs. Accordingly, the Court will deny Plaintiff's Motion and grant Defendants' Motion.

3 **II. BACKGROUND**

4 The Court incorporates by reference Judge Denney's summary of the case's
5 background provided in the R&Rs (ECF No. 50 at 1-2; ECF No. 52 at 1-2), which the
6 Court adopts to the extent they are consistent with the findings below.

7 **III. DISCUSSION**

8 The Court addresses Plaintiff's objections to each R&R in turn. Because Plaintiff
9 filed his Objection, the Court conducts a de novo review of those objected-to findings and
10 recommendations. *See United States v. Reyna-Tapia*, 328 F.3d 1114, 1116 (9th Cir.
11 2003) ("[D]e novo review of the magistrate judges' findings and recommendations is
12 required if, but *only if*, one or both parties file objections to the findings and
13 recommendations.").

14 As an initial matter, Plaintiff argues that 28 U.S.C. § 636(b)(1)(B), under which this
15 matter was referred to Judge Denney, pertains to criminal cases, not civil cases. (ECF
16 No. 53 at 1.) However, 28 U.S.C. § 636(b)(1)(B) applies to both civil and criminal cases
17 and certainly applies here. Under that subsection, "a judge may also designate a
18 magistrate judge . . . to submit to a judge of the court proposed findings of fact and
19 recommendations for the disposition, by a judge of the court, of any motion excepted in
20 subparagraph (A)"—which includes motions for judgment on the pleadings and for
21 summary judgment in a civil case. 28 U.S.C. § 636(b)(1)(A)-(B).

22 As to both R&Rs, Plaintiff objects to the finding that he "alleges that he has had
23 hepatitis C since 1998" and asserts that he has had hepatitis C since 1968. (ECF No. 53
24 at 1.) For the record, the Court finds that, consistent with Plaintiff's operative complaint
25 (ECF No. 6 at 4) and the screening order in this case (ECF No. 7 at 3), Plaintiff alleges
26 that he has had hepatitis C since 1968.

27 **A. Objection to First R&R**

28 Judge Denney recommends the Court deny Plaintiff's Motion because Plaintiff

1 failed to establish that he is entitled to judgment on the pleadings by simply relying on a
2 previously filed and denied motion for appointment of counsel. (ECF No. 50 at 3.) In the
3 underlying briefing, Plaintiff appears to clarify that his motion for judgment on the
4 pleadings was based only on his motion for appointment of counsel and was filed because
5 defense counsel indicated that he would not object to the motion for appointment of
6 counsel. (ECF No. 27 at 1.) The Court clarifies for Plaintiff that filing a motion for judgment
7 on the pleadings in support of or based on an unobjected-to motion is not necessary and
8 is in fact procedurally improper.

9 To the extent Plaintiff is objecting to the First R&R, Plaintiff appears to reiterate his
10 allegations that he has had hepatitis C since 1968, is enrolled in the infectious disease
11 chronic clinic for hepatitis C, and still has not gotten any treatment for hepatitis C from
12 NDOC medical staff. (ECF No. 53 at 1.) Plaintiff's sparse argument and reiteration of
13 allegations from his complaint is insufficient to establish an entitlement to judgment on
14 the pleadings. A Rule 12(c) motion challenges the legal sufficiency of the *opposing party's*
15 pleadings, and therefore, Plaintiff needed to have pointed to the legal sufficiency of
16 Defendants' defenses in their answer if he were attempting to file a proper Rule 12(c)
17 motion. See Judge Karen L. Stevenson & James E. Fitzgerald, *Rutter Practice Guide:*
18 *Federal Civil Procedure Before Trial (Calif. and 9th Cir. Edition)*, Ch. 9-E Motion for
19 Judgment on the Pleadings. Accordingly, the Court overrules Plaintiff's Objection as to
20 the First R&R, adopts the First R&R, and denies Plaintiff's Motion.

21 **B. Objection to Second R&R**

22 Judge Denney recommends granting Defendants' Motion because, although there
23 is a genuine issue of material fact as to whether Plaintiff had hepatitis C, there is no
24 evidence that a failure to provide or delay in providing hepatitis C treatment has led to
25 further injury. (ECF No. 52 at 8-9.) "A delay in treatment can violate the constitution if it
26 results in injury." *Stewart v. Aranas*, 32 F.4th 1192, 1195 (9th Cir. 2022) (citing *Shapley*
27 *v. Nev. Bd. of State Prison Comm'rs*, 766 F.2d 404, 407 (9th Cir. 1985)). "[P]laintiffs
28 alleging deliberate indifference must also demonstrate that the defendants' actions were

1 both an actual and proximate cause of their injuries.” *Lemire v. California Dep’t of Corr. &*
2 *Rehab.*, 726 F.3d 1062, 1074 (9th Cir. 2013).

3 First, the Court agrees with Judge Denney’s analysis that there is a genuine
4 dispute of material fact as to whether Plaintiff has had hepatitis C. (ECF No. 52 at 7-8.)
5 Defendants proffer a declaration by Minev stating that Plaintiff did not suffer from chronic
6 hepatitis C. (ECF No. 31-2 at 4.) On the other hand, Plaintiff’s chronic care medical
7 records (ECF No. 33-1 at 3), Minev’s response to one of Plaintiff’s grievances (ECF No.
8 41 at 4), and Plaintiff’s sworn allegations (ECF No. 6 at 4) all indicate that Plaintiff has
9 had hepatitis C.

10 Next, as to causation and “further injury,” consistent with Judge Denney’s analysis
11 (ECF No. 52 at 8-9), the Court finds that Defendants have met their initial burden by
12 negating these essential elements of Plaintiff’s case. Defendants have presented the
13 following evidence to demonstrate that any alleged delay in hepatitis C treatment did not
14 cause any further injury and that any alleged injury to Plaintiff’s gallbladder was not
15 caused by any delay in hepatitis C treatment: (1) Plaintiff’s abdominal x-ray that was
16 negative for “acute abdominal pathology,” showing no evidence of liver cancer (ECF No.
17 33-4 at 2; ECF No. 31-2 at 4); (2) Plaintiff’s APRI score³ of 0.12 within normal limits,
18 showing no evidence of liver damage (ECF No. 33-3 at 2; ECF No. 31-2 at 3-4); and (3)
19 a declaration by NDOC’s medical director stating that hepatitis C “does not have a direct
20 viral effect on the gallbladder” (ECF No. 40-1 at 2).

21 Shifting the burden to Plaintiff, he asserts that he had to have emergency surgery
22 to remove his gallbladder and gallstones lodged between his liver and pancreas after a
23 correctional officer had noticed he had jaundice. (ECF No. 36 at 4.) The Court agrees
24 with Judge Denney that Plaintiff provides no medical records or declarations from medical
25 providers or correctional officers to substantiate these assertions or any evidence that his
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27 ³An APRI score is derived from the Aspartate Aminotransferase Platelet Ratio
28 Index formula, which assesses chronic hepatitis C progression. If a patient’s APRI score
is above 0.5, there may be some liver damage (fibrosis). If the score is above 1.5, the
patient likely has or is quickly approaching cirrhosis of the liver. (ECF No. 31-2 at 3.)

1 gallbladder surgeries were related to hepatitis C. (ECF No. 52 at 9.) Plaintiff therefore
2 fails to meet his burden to oppose summary judgment.

3 Plaintiff objects to the Second R&R arguing that: (1) an emergency room surgeon
4 had to remove Plaintiff's gallbladder that was "infected with the hepatitis disease" (ECF
5 No. 53 at 2; ECF No. 36 at 4); (2) Plaintiff is unable go to that hospital to obtain evidence
6 or declarations from his medical providers (ECF No. 53 at 3); and (3) Plaintiff intends to
7 prove his case at trial with the surgeon's testimony (*id.*).⁴ The Court finds Plaintiff's
8 objections unpersuasive because he cannot rely on conclusory allegations unsupported
9 by factual data to avoid summary judgment at this stage. *See Matsushita Elec. Indus. Co.*
10 *v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). And an expressed inability to obtain
11 evidence and an intent to call certain witnesses at trial does not constitute evidence by
12 which a reasonable juror can find in his favor at this stage.

13 Accordingly, the Court overrules Plaintiff's Objection as to the Second R&R, adopts
14 the Second R&R, and grants Defendants' Motion.

15 **IV. CONCLUSION**

16 The Court notes that the parties made several arguments and cited to several
17 cases not discussed above. The Court has reviewed these arguments and cases and
18 determines that they do not warrant discussion as they do not affect the outcome of the
19 motions before the Court.

20 It is therefore ordered that Plaintiff's objection (ECF No. 53) to the First and Second
21 Report and Recommendation of U.S. Magistrate Judge Craig S. Denney is overruled.

22 It is further ordered that Judge Denney's First R&R (ECF No. 50) is adopted.

23 It is further ordered that Judge Denney's Second R&R (ECF No. 52) is adopted.


24 It is further ordered that Plaintiff's motion for judgment on the pleadings (ECF No.
25 25) is denied.

27 ⁴Because Plaintiff does not object to Judge Denney's denial of Plaintiff's construed
28 request for relief under Federal Rule of Civil Procedure 56(d) (ECF No. 52 at 5), the Court
need not conduct de novo review as to that analysis and finds that Judge Denney did not
clearly err.

1 It is further ordered that Defendants' motion for summary judgment (ECF No. 31)
2 is granted.

3 It is further ordered that the Clerk of Court enter judgment accordingly and close
4 this case.

5 DATED THIS 5th Day of January 2024.

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9 MIRANDA M. DU
10 CHIEF UNITED STATES DISTRICT JUDGE
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